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Supreme Court of the United States

No. _____

October Term, 1973

DOLLOFF INDUSTRIES, INC.,
Petitioner,

vs.

THE HONORABLE THOMAS D. LAMBROS, JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, and GENERAL ELECTRIC COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on January 23, 1974.

OPINIONS BELOW

There are no opinions in the case other than that of mootness on which the Court of Appeals based its original decision as contained in its Order of December 13, 1973 App. p. 19).

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 13, 1973. A timely petition for rehearing was decided on January 23, 1974 (App. p. 20), and this petition for certiorari is filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Can a district judge place himself above a United States Court of Appeals, and can a United States Court of Appeals abrogate its responsibilities of appellate review, through the expedient of allowing the district judge to withdraw from a case, thus to avoid decision against the district judge by the subterfuge of declaring the issues in the case moot, under circumstances that the district judge must apologize by brief for his abuse of judicial discretion, with the claim that his mistakes were in good faith, those mistakes being unexcusable delay for almost a year and a half on pending motions, complete avoidance of any decision on another pending motion, issuance of contradictory orders, and disregard of his own local rules of practice, with the result that the district judge's contradictory orders and complete disregard of the Rules of Civil Procedure, specifically Rules 33 and 34, has operated to the advantage of one of the largest corporations in this country in a manner that completely impugns the integrity of the judicial process?

2. Where the trial judge is charged with judicial abuse of discretion in handling of discovery by his failure to rule on petitioner's motion for entry upon the land of the de-

fendant corporation and further in his failure to accord petitioner the benefits of Rule 33(c) of the Federal Rules of Civil Procedure, can a United States Court of Appeals disregard its responsibility of appellate review in a mandamus action by allowing the trial judge to withdraw from the case, thereby placing the trial judge in control of the appellate proceeding?

3. In the handling of this case by the United States Court of Appeals, has this petitioner been denied the right of judicial review to the deprivation of its property without due process of law in a manner contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

STATUTES INVOLVED

This case involves the application of Rules 33(c), 34 and 37(a)(2) in a mandamus proceeding filed in the United States Court of Appeals for the Sixth Circuit where the Court of Appeals has refused to decide on the ground of mootness by allowing the trial judge to withdraw from the case.

These Rules are set forth in the Appendix at pages 21-23.

STATEMENT OF FACTS

This case originated as a mandamus action filed in the United States Court of Appeals for the Sixth Circuit charging abuse of a trial judge's discretion and usurpation of judicial power as it pertains to discovery under Rules 33(c), 34 and 37 of the Federal Rules of Civil Procedure. The jurisdiction of the Court of Appeals was involved under Section 1651(a), Title 28, United States Code, and Rule 21, Federal Rules of Civil Procedure. The Court of Appeals refused to decide the issues involved on the ground of mootness by allowing the trial judge to withdraw from the case. Petitioner objected to such procedure by a timely motion for reconsideration.

The petitioner did business with the General Electric Company under a contract dated August 6, 1969, amended by purchase order supplements dated January 19, 1970; February 2, 1970; February 10, 1970; March 16, 1970; April 23, 1970; and May 18, 1970. The General Electric Company by telegram dated June 12, 1970, terminated the work to be done under the contract. The petitioner on June 23, 1971, filed suit in the United States District Court in Cleveland, Ohio, asking damages for breach of contract and fraud. Petitioner's work related to precision tolerances on jet engine blades specific to C-5A military transport engines. Many, if not most, of the parts used in the C-5A military engine are interchangeable to the CF-6 engine powering commercial airplanes. The nature of a General Electric contract, be it military or commercial, is determined by a blockage usage on purchase orders and purchase order supplements.

The discovery in the case falls into several categories. The delivery schedule under the contract was to be 75

to 80 parts a week. This schedule was changed internally by the General Electric Company, for example, to 60 and then to 45 and next to 25 parts a week. In the meantime, the General Electric Company on each of its purchase order supplements still represented to the plaintiff that the delivery schedule was to be 75 to 80 parts a week. The production releases internally of the General Electric Company, therefore, were of utmost importance in proving both breach of contract and fraud.

The blockage usage on the General Electric purchase orders and purchase order supplements was important. These blocks indicate whether there is a military or a commercial contract. The blocks checked on the purchase order supplements indicate a commercial contract. The blocks checked on the original purchase order indicate a military contract. This means that there may be a commingling of military and commercial parts on military contract, which is iliegal. It means that the military engine may be bearing the cost of commercial engines; and that also is illegal. In the petitioner's view, it also may be evidence of fraudulent intent. The petitioner therefore directed specific interrogatories to this aspect, as well as other aspects of the case. The petitioner also asked entry upon the defendant corporation's premises and inspection pursuant to Rule 34 of the Federal Rules of Civil Procedure (10a-12a). Plaintiff filed two motions, on January 12, 1972, and on March 1, 1972, protective of this Rule 34 Request, these Motions being pursuant to Rule 37(a)(2) of the Federal Rules. The trial judge avoided the issue and never acted upon the petitioner's Motions respecting this Rule 34 Request; neither did the Magistrate to whom the discovery at one time had been referred take any action on these Motions respecting petitioner's Rule 34 Request.

One further aspect of the case involved a change in specifications. Petitioner's work upon the blades is called a polishing operation. Actually it is a grinding, hand sanding, or abrasive type of operation in which titanium is removed from the blade to a specific tolerance. Petitioner in its discovery requested the paper work documenting the change in specifications so as to prove that the change benefited other than petitioner's polishing operation. The trial judge denied the petitioner's right to this paper work and further in practical effect denied petitioner all discovery in the case. Strangely, the change in specifications raised as a corollary a question of engine disintegration, an issue which General Electric apparently wished to avoid entirely, particularly in view of reported instances of disintegration of engines in flight.

The defendant corporation in its discovery had propounded interrogatories to the petitioner. These interrogatories in many instances were irrelevant and were intended to impose unreasonable hardship upon the petitioner and its president. Petitioner rather than to object and delay the discovery instead made its plant and records available under Rule 33(c) of the Federal Rules of Civil Procedure. This together with petitioner's Rule 34 Request placed upon each party the responsibility of doing its own work. The trial judge disregarded Rule 33(c) in its entirety, as he did the other Rules of Civil Procedure.

That the trial judge in the case was guilty of an abuse of discretion leaves little room for doubt. It is significant that the trial judge chose to file an answer in the Court of Appeals. This answer in effect was an apology for his actions as he tried to defend himself. His actions in the case certainly must have been apparent to the Court of Appeals, because they specifically limited their decision to that of mootness. We need only review

the trial judge's orders in the case to appreciate the reasons why this was so.

1. **The trial judge's order of November 29, 1971** (1a)[1]

The discovery was to be concluded by March 31, 1972; counsel for the parties were to conduct a settlement meeting no later than April 12, 1972; status reports were to be submitted no later than April 19, 1972; and the case was to be tried to a jury at 9:30 A.M. May 9, 1972. In fairness to the attorney for the General Electric Company, at no time did he take any action to delay the proceedings. Both he and this petitioner took those steps necessary to have this case ready for trial at 9:30 A.M. May 9, 1972. So what did the trial judge do?

2. **The trial judge's order of April 17, 1972** (2a)

This was a belated order, as briefs filed by both parties can establish, one brief having been filed on January 24, 1972, and the other on February 11, 1972. The judicial direction to which this order refers was and has been entirely lacking; and this can be borne out by the entire record in these proceedings.

The depositions of Air Force employees—and other depositions

In this regard, there has been no further order respecting depositions that were to be taken on April 18, 1972, from two civilian employees of the United States Air Force. The trial judge's order of April 17, 1972, had the effective result of completely and improperly throwing into a state of indecision the taking of simple depositions. There has been no clarification by the trial judge as to the status

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1. The references are to the Record filed in the Court of Appeals.

of the depositions of these Air Force employees, especially as to a new date for their taking.

These depositions raise one other point of importance. In order to have some idea as to whose depositions would be necessary, the petitioner has consistently asked in this discovery for the organizational structure of General Electric, particularly at the Evendale plant. Even this the trial judge has denied, which is a complete abuse of discretion, because it denied petitioner all meaningful opportunity to take depositions of General Electric personnel.

3. The trial judge's order of May 16, 1972 (3a)

After both parties presumably had complied with this order, the trial judge then held the discovery in abeyance for over six months, until December 8, 1972.

4. The trial judge's order of December 8, 1972 (4a)

This order referred the discovery to a Magistrate under Local Rule 15 I.B., which reads:

> "B. On reference from a Judge in any given case, a Magistrate may hear argument and render a recommended decision on any and all contested discovery matters and discovery motions. Included are all motions relating to discovery under Civil Rules 26-37 such as objections to interrogatories, objections to requests for admissions, motion to compel answers to interrogatories or requests for admissions, motions concerning depositions, motions for discovery, inspection, or production of documents and other materials, and motions for physical examinations or for investigations. *The parties shall have a right, after service on them of the Magistrate's report and recommended decision, to make objections to the referring Judge.*" (Emphasis added.)

To this time, there has been no compliance whatsoever by either the trial judge or the magistrate with the rule respecting the depositions of the Air Force employees or as to the petitioner's Rule 34 Motion. This alone was enough to justify this mandamus action. However, we also should examine the conduct of the trial judge and of the magistrate respecting the other discovery.

5. **The trial judge's order of January 20, 1973** (5a)

This order speaks for itself; it since has been vacated. Suffice it to say that the Magistrate held no hearing; and there was no report or recommended decision sent to the parties. They had no opportunity to make any objections.

6. **The trial judge's order of February 13, vacating his order of January 20, 1973** (6a)

After the petitioner had made inquiry respecting the trial judge and the magistrate failing to follow the Court's rules of practice, the trial judge revoked his order of January 20, 1973; and the discovery now was back in the hands of the magistrate. The magistrate then notified the parties as to a hearing date and held a two hour hearing which he then continued. The continued hearing next never was held and the Recommendation dated March 29, 1973, was received by the petitioner (7a). There was no Report by the magistrate, as required by the Rule. The petitioner filed objections to the Recommendation; and the trial judge finally entered an order dated September 4, 1973.

7. The trial judge's order of September 4, 1973 (7a)

The petitioner finds it difficult to describe this order. The defendant had filed a total of 139 Interrogatories. An examination of these Interrogatories will show that many of them are repetitious, unnecessary and not relevant to this lawsuit. However that may be, the petitioner followed the procedure of making its plant, records and facilities available to General Electric in accordance with Rule 33(c) of the Federal Rules of Civil Procedure. As an example, Interrogatories Nos. 18(a) to (e) and 20(a) to (e), which the trial judge ordered answered again, are representative of harassment in asking for information which in reality are General Electric's own documents, the Interrogatories and Answers, with the sequence starting with No. 16, being:

"16. State whether or not the contract complained of in plaintiff's Complaint was the first such contract between the parties for the polishing of fan blades by Dolloff Industries, Inc.

ANSWER: No.

"17. If not, state the number of prior contracts entered into between plaintiff and defendant providing for the polishing of fan blades by Dolloff Industries, Inc.

ANSWER: Five.

"18. For each such prior contract, state the following:

(a) Date of such contract.

(b) Date contract completed.

(c) Total quantity of blades to be polished.

(d) Quantity per week or month.

(e) Price per blade.

ANSWER: This information already is on file with the General Electric Company. A folder containing each contract is maintained or will be maintained by the plaintiff at its plant respecting each contract. This folder containing the information requested, together with the final invoice submitted to the General Electric Company, will be available for your inspection in accordance with Rule 33(c) of the Federal Rules of Civil Procedure.

"19. State for each such contract whether there were any amendments that were subsequently negotiated by and between the parties.

ANSWER: See answer to Interrogatory No. 18.

"20. If so, state for each prior contract the following:

(a) The number of amendments for each contract.

(b) The date of each amendment.

(c) The contents of each amendment.

(d) Whether said amendments were written or oral.

(e) State whether Dolloff Industries, Inc. agreed in writing to each such amendment.

(1) If not, state by content, number and date all such amendments to which plaintiff did not agree in writing.

ANSWER: See answer to Interrogatories Nos. 18 and 19."

These were proper answers to those Interrogatories. *The trial judge in fact so held them to be in his order of January 20, 1973, and himself accepted them as proper answers.* The trial judge's action in his order of September 4, 1973, was a complete abuse of discretion and was extremely prejudicial. The contracts and amendments to which these Interrogatories refer, incidentally, are General Electric's own purchase orders and supplements.

The trial judge's order respecting Mr. Korpal's deposition must also be termed an abuse of discretion. *Also it is an order in futility, because Mr. Korpal already has submitted himself to the deposition.* Some background is necessary here. The petitioner's president received a summons, a copy of which is included in the appendix (13a-14a). In the first place, this was an improper and unduly broad summons; to comply with it was a virtual impossibility; and petitioner filed on January 12, 1972, a motion to quash the summons or in the alternative for a protective order. The petitioner did this so as not to delay the May 9, 1972, trial date. *The deposition was taken on April 4 and 5, 1972, making the issue moot as to Mr. Korpal's deposition; and this was pointed out to the trial judge.* The amazing aspect of his decision respecting the deposition is to require transportation of practically the petitioner's entire plant to an attorney's law office in compliance with a subpoena that is completely lacking in being specific and which includes practically every conceivable type of record for the years from 1967 through 1970. *The trial judge's action as to this subpoena alone is an abuse of discretion.*

REASONS FOR ALLOWING THE WRIT

I.

The district judge so far departed from the accepted and usual course of judicial proceedings, and the United States Court of Appeals by abrogation of responsibility through the subterfuge of mootness in allowing the district judge to withdraw from the case, creates important questions of procedure in denying petitioner all judicial fairness that it calls for the exercise of this Court's power of supervision.

This action involves a case in which the integrity of the judicial process has been made meaningless by the action of the trial judge, which then is condoned by the action of the appellate court. In the Court of Appeals, petitioner directed his application for rehearing to the action of the Court of Appeals in allowing the trial judge to withdraw. This made the trial judge the Court of Appeals, the judge and jury in the appellate process. He was superior to the Court of Appeals. That is not the function of the judicial process. To allow this is directly contrary to decisions of this United States Supreme Court. See *Tumey v. Ohio*, 273 U.S. 510 (1920); and *In re Murchison*, 349 U.S. 133 (1955). These cases hold that due process of law requires an impartial tribunal. The trial judge here was a party to the mandamus proceedings. It was entirely to his advantage to withdraw, so that he could avoid any decision against him. His orders in the case were such that they couldn't be defended. He knew it. Yet the Court of Appeals allows him to become judge and jury in the appellate court; it is meaningless, therefore that the petitioner have any remedy accorded it by mandamus, because the trial judge in the Court of Appeals can defeat the remedy. Such a result, it appears, would

not be permitted in this Supreme Court. See SUPREME COURT PRACTICE, Section 16.4, Fourth Edition, Stern and Gressman, discussing this very subject. There is an automatic substitution of the successor as a party. The reason for this is apparent. It is presumed that the successor will continue the policy responsible for the litigation; and there is no reason to believe the situation will be otherwise if this case is allowed to go back to the District Court without a proper appellate court supervision of these proceedings.

II.

This case involves important issues of discovery under Rules 33(c) and 34 of the Federal Rules of Civil Procedure. These rules are an important area of federal law involving questions not yet settled by this court. The district judge has decided federal questions, which possibly are in conflict with applicable decisions of this court. The district judge can avoid following the Federal Rules of Civil Procedure and he then can defeat jurisdiction in mandamus of a court of appeals in a manner contrary to decisions of this Supreme Court.

The requirements of due process are that there be a fair hearing before a fair tribunal. Although the federal system allows the filing of an affidavit of prejudice against the trial judge, that procedure does not seem to have received favor. Instead, the federal courts have maintained control over the district judges through the avenue of mandamus; and this is particularly true as to discovery proceedings.

The trial of any case can be controlled improperly by a trial judge merely by the manner in which he handles

the discovery. Such improper control can make trial of the case impossible; and the remedy of an appeal in such instance is completely inadequate. As a result, justice becomes meaningless. This is one of the functions that Rules 33(c) and 34 of the Federal Rules were designed to circumvent. Rule 33(c) accords a party the option of making its books and records available to the party seeking discovery. In such instance, a company the size of the General Electric Company must do its own work, which is the procedure followed by petitioner when faced with interrogatories in substance that were designed to place an undue burden upon the petitioner. In turn, Rule 34 is the reverse of Rule 33(c). Rule 34 provides for entry upon the defendant's land to examine books and records. This in substance made the books and records of the General Electric Company available to the petitioner; and in this instance the petitioner would be responsible for doing its own work.

So what did the trial judge do? He completely disregarded Rule 33(c) of the Federal Rules; and he never made a ruling on petitioner's Rule 34 Request.

This Court has held that usurpation of judicial power or abuse of judicial discretion in application of the Federal Rules respecting discovery is reviewable in a mandamus proceeding. See *Schlagenhauf v. Holder*, 379 U.S. 101 (1964). That review in mandamus serves a valuable judicial function in the appellate system, see *I. B. M. v. United States et al.*, 471 F.2d 507 (2d Cir. 1972), and *Filmon Process Corp. v. Hon. John J. Sirica, Judge*, 379 F.2d 449 (D.C. Cir. 1967). Compare *Ex Parte Peru*, 318 U.S. 196 (1945), *Ex Parte Simons, Petitioner*, 247 U.S. 231 (1918) and *United States Alkali Export Association, Inc. v. United States*, 325 U.S. 196 (1945).

That a trial judge under the circumstances of this case can make the remedy in mandamus meaningless is an unthinkable judicial process. It defeats the Federal Rules of Civil Procedure. It makes discovery meaningless. It reverts the case to a status quo in the trial court. It makes a sham of due process.

III.

The Federal Rules of Civil Procedure are an integral and important function in the area of due process. Their proper interpretation has a broad and general impact in judicial proceedings. The trial judge should not be allowed to withdraw so as to defeat the petitioner's remedy in mandamus on issues of broad judicial import. The importance of the issue calls for review by this Court.

This Court recognizes mandamus in judicial proceedings to be an appropriate remedy respecting discovery where appeal is an inadequate remedy. See *Schlagenhauf v. Holder*, 379 U.S. 101 (1964). The appellate courts have recognized this also, in respect to which see *I. B. M. v. United States et al.*, 471 F.2d 507 (2d Cir. 1972).

The instant litigation illustrates graphically the reason for the rule. The trial judge's disregard of Rules 33(c) and 34 placed the defendant corporation in complete control of the proceedings under circumstances that there is no judicial process in the case. This is a complete denial to the petitioner of any and all due process to the deprivation of property; and this is true both in the trial and appellate courts. This calls for exercise of this Court's jurisdiction. See *Tumey v. Ohio*, 273 U.S. 510 (1920); and *In re Murchison*, 349 U.S. 133 (1955).

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this petition for certiorari should be allowed.

Respectfully submitted,

JAMES F. SEXTON
Attorney for Petitioner

APPENDIX

JUDGMENT ENTRY OF THE COURT OF APPEALS

(Filed December 13, 1973)

No. 73-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLLOFF INDUSTRIES, INC.,
Petitioner,

vs.

THE HONORABLE THOMAS D. LAMBROS, JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, and GENERAL ELECTRIC COMPANY,
Respondents.

ORDER

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges.

Petitioner seeks an order in the nature of mandamus to review the judgments, decisions and actions of the Respondent, Honorable Thomas D. Lambros of the United States District Court, Northern District of Ohio. It appearing that Respondent has disqualified himself from further participation in the case, the petition for an order in the nature of mandamus is moot. Therefore, IT IS ORDERED that the petition for Writ of Mandamus be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

ORDER OF THE COURT OF APPEALS DENYING MOTION FOR RECONSIDERATION

(Filed January 23, 1974)

No. 73-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLLOFF INDUSTRIES, INC.,
Petitioner

v.

THE HONORABLE THOMAS D. LAMBROS, JUDGE OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, and GENERAL ELECTRIC COMPANY
Respondents

ORDER

Before: CELEBREZZE, PECK and MCCREE, Circuit Judges.

Upon due considerationPetitioner's motion for reconsidered is hereby DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

FEDERAL RULES OF CIVIL PROCEDURE

Rule 33. Interrogatories to Parties

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other

property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons not parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 37. Failure to Make Discovery: Sanctions

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).